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Subject: Background with questions for the call this afternoon

FDEP and SHPO team members,

Below are the summaries of the comments we received about the Programmatic Agreement for the 404 Assumption Process; however, almost all of the comments/questions pertain to the Operating Agreement, the language in the Operating Agreement, and Florida's process. I wanted to give you a chance to look over the comments/questions before our call.

Thanks again for all of your help.

Code 8b Programmatic agreement

Expand the Scope of Florida's State Programmatic General Permit

Commenter (0346) suggested that Florida lacks expertise, staff, resources, and enforcement capabilities needed to implement its own Section 404 Program and should instead work with the Army Corp to expand the scope of its state programmatic general permit.

Proposed Operating Agreement needs consultation and clarification

Commenter (0431) expressed appreciation to EPA consulting with the Seminole Tribe pursuant to Section 106 on the development of a Programmatic Agreement for an assumed 404 Program. However, the Operating Agreement does not currently reflect coordination with the Advisory Council on Historic Preservation (ACHP). The commenter explained that EPA requested feedback on the role of the ACHP in a potential Programmatic Agreement, which the Seminole Tribe provided. The Seminole Tribe strongly recommends a Programmatic Agreement be developed to clearly set forth in what circumstances EPA will involve the ACHP. The Seminole Tribe requested that they be a signatory to any Programmatic Agreement and that it be available to the Tribe for review before EPA decides on Florida's application to implement its own Section 404 Program.

Commenter (0349) provided comments and questions on the Proposed Operating Agreement (EPA-HQ-OW-2018-064-0006), requesting clarification on when, how, and who the state plans to consult with respect to Tribal consultation. The questions centered on how the state consultation will differ from Federal consultation, who will be consulted, and specific questions about the language used in the proposed operating agreement.

Following are their specific comments:

Pg. 1, A. Parties, 2. Consulting Parties, b.

- *Indian tribes. Indian tribes include any Indian Tribe, band, group, or community which are recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians. Indian tribes frequently have an interest in State undertakings which may affect cultural resources on historic properties of religious and cultural significance on ancestral, aboriginal, or ceded lands.*

- o This should just be listed as federally recognized tribes. Bands, groups, and communities are public entities, not federally recognized tribes. Where is this language from?

- o Please provide examples of when Tribes are consulted on state undertakings. The MCN is unaware of consultation on state undertakings as we have only been contacted about federal undertakings in the past.

Pg. 2, A. Parties, 2. Consulting Parties, b. Indian tribes, i.

- *The Department shall consult with any Indian tribe that attached religious and cultural significance to historic properties that may be affected by an application. o It should be "federally recognized Indian tribe."*

- o Does the state plan to consult with state recognized tribes? If so, they are the public and should not be grouped with or consulted with federally recognized tribes.

Pg. 2, B. Duties and Responsibilities, 1. The Department

- *The Department shall be responsible for leading the historic properties review.*

- o Who at the Department is conducting historic properties review? Who is making the NRHP determinations? An SOI-qualified historian, archaeologist, etc. is required to make these decisions. We need to see the CV or resumes of the Department Staff who will make these determinations. The lead agency (the Department) is responsible for making determinations of no effect, no adverse effect, no historic properties effected, adverse effect, etc. Will the department do this or will the SHPO do this? Through Section 106 consultation, tribes are asked to concur with the State or lead agency's finding of effect or let them know if there are cultural or religious properties that could be impacted by the 404 permit.

Pg. 3, B. Duties and Responsibilities, 1. The Department, b.

- *To THPO or Indian Tribe when the interested Indian Tribe does not have a THPO.*

- o This is worded weirdly. Why not just put “federally recognized tribes with an area of interest.”

- o Again, we have to remember that “Indian Tribe” as it is now, does not stipulate that they are federally recognized, but seems they could also be a band or some type of group (i.e. the public).

Pg. 4, B. Duties and Responsibilities, 1. The Department, d. To the public and local governments.

- o The Tribes and public/local governments are listed separately here, which is correct. Due to this, do not try to send the Muscogee (Creek) Nation public notices when we are not the public. We are a sovereign nation and we will not take public notices as consultation on projects.

Pg. 4, B. Duties and Responsibilities, 1. The Department, d. To the public and local governments, i.

- *Notify the public...*

- o How will the public be notified? Newspaper? Mail?

Pg. 4, B. Duties and Responsibilities, 1. The Department, d. Future Coordination

- *In the event the Department employs a historic resource coordinator, the Department will coordinate with SHPO and the THPO/Indian Tribes to establish procedures to streamline certain categories of projects.*

- o Streamlining certain projects would require another agreement document (e.g. programmatic agreement).

Pg. 5, B. Duties and Responsibilities, 2. SHPO, c. To THPO/Indian Tribes, ii

- *On the same day received, provide information related to an unanticipated discovery, effects to historic resources, or the identification of unmarked human remain on issued no-notice general permits, general permits, and individual permits.*

- o How will this be done? By email? Phone call?

Pg. 5, B. Duties and Responsibilities, 3. THPO/Indian Tribes, a. To the Department, i.

- *Review general permit and expedited applications to determine the presence or absence of cultural resources or historic properties of religious and cultural significance or request that the project be evaluated as an individual permit because of potential historical resources concerns.*

- o Why are there expedited applications? This should not be a regular occurrence and putting this here makes it seem as if the agreement is giving them the chance to expedite all the applications they want. Why is this process needed? Are archaeological surveys required by applicants?

- o What is the difference between an individual permit and a general permit?

Pg. 7, II Procedures, A. Consultation during the Depts. initial review of State 404 Program permit, 1.

- *The body of the email/notification shall include:*

- o This will not be a public notice to the Tribe. Additionally, we want information provided pertaining to any surveys or sites that are in the area (FLSHPO).

Pg. 9, II Procedures, B. Consultation during the public notice process, 1. Types of Action, a.

- *The Department will provide a public notice of all administratively complete State 404 Program individual permit applications pursuant to the provisions of Rule 62-331.060, F.A.C. SHPO, THPO/Indian Tribes shall receive an email notification of the public notice in accordance with paragraph 62-331.060(2)(a), F.A.C.*

- o A public notice does not constitute tribal consultation. A consultation letter template should be made and used when notifying tribes and inviting them to consult on a state undertaking.

Pg. 9, II Procedures, B. Consultation during the public notice process, 2.

- *The public notice shall specifically mention and solicit comment on the historic properties review process, including any initial effects determinations and recommendations received by SHPO/THPO/Indian Tribes during the Department's initial review of the application. If the initial determination is that the activity will*

have no effect on historic properties, a “no potential to cause effect” or “no effect” statement shall be included in the public notice.

o This is a concern. Tribal comments should not be included in a public notice or be made available to the public. Also, the public should not receive an archaeological report. If any information is posted online for them to review with the application, then it should be highly redacted. Confidentiality is a major issue when identifying or when a project impacts a cultural site.

Pg. 10, II Procedures, D. Provisions for State 404 Program General Permits (no notice)

• *If both SHPO and THPO/Indian Tribes do not respond within 15 days of receipt of the request, and the project does not otherwise require notice to the Department to proceed under the 404 general permit, the permittee may proceed with the work, provided all other required authorizations have been obtained.*

o Why do the no-notice permits require a quick 15-day review? What is the nature of the no-notice permits? What are examples of when this would apply? Explain further.

Pg. 13, III Effects Determination and Resolution of Adverse Effects, B. Resolution of Adverse Effects, 1. Continued Consultation., b.

• *The Department, the SHPO, and THPO/Indian Tribes, if participating, may agree to invite other individuals or organizations to become consulting parties.*

o What other individuals or organizations would be invited? For a disagreement, would the ACHP involved?

Pg. 13, III Effects Determination and Resolution of Adverse Effects, B. Resolution of Adverse Effects, 1. Continued Consultation., c.

• *The Department shall make information available to the public, subject to any confidentiality requirements. The Department shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking.*

o Why would the public be involved if it is a disagreement between the Tribes and EPA? They should not be privy to this information.

Pg. 14, III Effects Determination and Resolution of Adverse Effects, B. Resolution of Adverse Effects, 2. Resolve Adverse Effects, e.

• *If agreement cannot be reached, the Department shall attempt to continue consultation to reach an acceptable agreement. However, if agreement is not possible, the Department shall proceed according to Section III.C.*

o The ACHP should be involved if no agreement can be made.

Pg. 15, III Effects Determination and Resolution of Adverse Effects, C. Federal Review, 3.

• *The Department shall, in accordance with paragraph 62-331.052(3)(b), F.A.C., notify the EPA if the Department does not accept the effect determination of a proposed activity or recommendations for the resolution of adverse effects of the THPO/Indian Tribes, together with the Department’s reason for doing so, in which case the EPA can comment upon, object to, or make recommendations.*

o Who at the EPA will make this determination? What staff will work on this? Will they be an archaeologist? SOI-qualified individuals?

Pg. 15, IV Terms and Definitions.

o Add “general permit” and “no-notice permit” to this.

Pg. 16, VI Training Requirements, A-C.

o Yes, there should be training. The use of “occasional” means that it could happen a few times every year or just once every ten years. You need to define this better.

o Also, who will contact the Tribes so that they can provide training?

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